No. 22319

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH ELAINE CRAIG,
Administratrix of the Estate
of ROBERT J. CRAIG, deceased,

Appellant,

vs.

THE UNITED STATES OF AMERICA, et al.,

Respondent.

On Appeal From the United States District Court
For the Southern District of California

APPELLANT'S OPENING BRIEF

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JURISDICTION OF THIS COURT

This is an appeal from an order of the District Court entered in an admiralty case, denying permission to amend a libel for wrongful death under the Death on the High Seas Act set forth in Title 46 of the U.S.C.A. Sections 761 through 768. Said statute provides that whenever the death of a person shall be caused by the wrongful act of another on the high seas, beyond a marine league from shore, the District Court of the United States in admiralty shall have jurisdiction of any suit. (See Cl. Tr., p. 2, ll. 26 through 32; p. 3, ll. 1 through 4; p. 4, ll. 20 through 32; and p. 5, ll. 1 through 24.)

The United States Court of Appeals for the Ninth Circuit has jurisdiction to entertain this Appeal pursuant to Title 28 U.S.C.A Section 1291, establishing

jurisdiction in the Court of Appeals from final decisions of the District Court of the United States, and Title 28 U.S.C.A. Section 1292(3), providing that the Court of Appeals has jurisdiction in appeals from interlocutory decrees of District Courts determining the rights and liabilities of the parties to admiralty cases, in which appeals from final decrees are allowed. Insofar as the respondent, LITTON SYSTEMS, INC. sued and served herein as DOE I, and appellant are concerned, the order finally determines the rights of appellant and respondent. (See Cl. Tr., pp. 91, 92, and 93, with the entry of the order being made in the Civil Docket of the United States District Court set forth in the Cl. Tr., p. 29 under date of June 2, 1967.)

STATEMENT OF THE CASE

This appeal involves the determination of the propriety of the filing of a suit in admiralty under the Death on the High Seas Act against known individually named defendants, together with an allegation as to ten (10) unknown fictitiously named defendants. The libel sets forth a cause of action against the named known defendants and fictitiously named defendants stating in substance that the plaintiff does not know who they are, but believes that they are in some manner responsible for the death in question and further specifically alleges that the fictitiously named defendants were careless and negligent in the construction, designing, engineering, fabricating, manufacturing, equipping, supplying and maintenance of the arresting gear assembly on board a vessel owned and operated by United States of America, more commonly known as the aircraft carrier CONSTELLATION. The libel was served on the United States of America, TIMKIN ROLLERBEARING COMPANY;

ALUMINUM COMPANY OF AMERICA; and BETHLEHEM STEEL CORPORATION. Preliminary motions have been made by the United States of America and Timkin Rollerbearing Company, which are not involved in the question presented on this appeal.

After the running of the Statute of Limitations under the Death on the High Seas Act, (August 19, 1965), plaintiff served an Alias Citation on the respondent, LITTON SYSTEMS, INC, as DOE I. Subsequently exceptions to the libel were filed and a motion was made by appellant to amend the libel to bring in the respondent, LITTON SYSTEMS, INC. as DOE I. The District Court acceded to the use of fictitiously named defendants, but refused to allow the amendment to bring in LITTON SYSTEMS, INC. as DOE I after the running of a Statute of Limitations, and by such order has precluded the maintenance of any action against LITTON SYSTEMS, INC. in any manner by appellant.

QUESTION ON APPEAL

The question involved is: Whether or not, once an action is maintained against fictitiously named defendants, must they be served prior to the expiration of any period of limitations; And, if they are not so served, does Rule 15c of the Federal Rules of Civil Procedure prevent them from being brought in unless they have actual notice of the action as distinguished from knowledge of the circumstances.

The proposition involved concerning fictitiously named defendants and amendments to pleadings is raised by means of an appeal from the order terminating the litigation between the appellant and the respondent, LITTON SYSTEMS, INC. Since the order is a final adjudication of appellant's claim against this respondent,

and prevents her from any judgment in the case, a review of the propriety of the order after a determination of the litigation involving the co-defendants would work an injustice on appellant and it would be fruitless to prove or attempt to prove her case against LITTON SYSTEMS, INC. She therefore must have a determination as to whether or not this particular defendant, LITTON SYSTEMS, INC. can be in the case. In addition thereto, further discovery could conceivably bring up additional parties involved in the manufacture of the arresting gear mechanism, who may be responsible for the accident in question; and, under the present state of the record, appellant would be forever precluded from bringing in additional defendants by the fictitious naming and appropriate amendments to the libel.

ARGUMENT

A. Jurisdiction for review, under 28 U.S.C.A. Section 1291

As pointed out above, jurisdiction of this Court is based upon Title 28 U.S.C.A. Sections 1291 and 1292(3). The pertinent portion of Section 1291 is set forth as follows:

> "the Courts of Appeals shall have jurisdiction of Appeals from all final decisions of the District Courts of The United States, . . ."

Where there has been an order made which was intended to terminate the litigation in the District Court, then such an order becomes an appealable order under the above quoted statute. See Peterson Steels vs. Seidmon (1951) 188 F.2d 193. In the present case, the order refusing plaintiff the right to amend her libel and insert the name of LITTON SYSTEMS, INC. in place of DOE I, effectively

precludes a merging of the Court's order into a final judgment that may be entered between the plaintiff below and the co-defendants since it is not a party. Since we are in the pleading stage, it is apparent from the complaint that plaintiff is suing for the wrongful death of her husband and the father of the minor children which occurred on the 19th of August, 1963, while he was landing his airplane on board the CONSTELLATION. The conduct proximately resulting in the death of decedent was the negligence of the manufacturers of the vessel and more particularly those individuals who may have manufactured the arresting gear mechanism. (Cl. Tr., p. 5, ll. 4-18.) It is important to point out that in addition to the named defendants, appellant sought recovery against unknown defendants listed as DOES I through X. Appellant is in doubt as to which of the defendants is responsible and thereby joined them all seeking to prove which one or ones were responsible at the time of trial. (See Cl. Tr., p. 5, ll. 20-24.) It goes without saying that the heirs at law of the decedent, namely his wife and children, at the time of the filing of this action, did not know and could not possibly have known of all of the component parts manufacturers, who may have been involved in making the arresting gear assembly installed on a first line fighting ship of the UNITED STATES NAVY. The heirs have filed, within the statutory period, an action against known and unknown parties and will require additional proof as to which one or ones may or may not be responsible.

A portion of this responsibility or nonresponsibility has already been decided by the District Court, insofar as the United States Government is concerned, wherein an order to dismiss the United States Government was granted and entered on December 29, 1965. (Cl. Tr., p. 28.) The defendant, TIMKIN ROLLERBEARING,

was granted a dismissal on the merits on December 9, 1966. (Cl. Tr., p. 29.) If appellant tries her case and is unsuccessful in proving a claim against the balance of the named defendants who have been served, the final judgment in the case will preclude the determination of the question involved in the present appeal, namely, whether or not fictitiously named defendants may be brought into the case after the running of the Statute of Limitations so long as cause of action has been stated against them. It is submitted that any final judgment between appellant and any of the remaining defendants can have absolutely no effect upon the order involved in the instant appeal, which completely precludes the maintaining of any action of any kind at any time against LITTON SYSTEMS, INC. For these reasons the order is a final determination under the statute set forth above.

There is authority for the proposition that where it would be impractical or futile to continue the litigation when an order terminating it as to certain parties has been made may be reviewed on appeal. See Eisen vs. Carlisle (1966) 370 F. 2d 119. In the event that LITTON SYSTEMS, INC. cannot be brought into this litigation, appellant may be in a position where she cannot seek redress against the party who manufactured the component parts of the arresting gear assembly. In companion litigation arising out of the occurrence in question, MC KIERNAN-TERRY CORP., one of the named defendants in the case at bench, has been declared non-existent and for all intents and purposes a party who can no longer be served with process (Cl. Tr., pp. 42, 45). The exact status of LITTON SYSTEMS, INC. and its relationship to MC KIERNAN-TERRY CORP. is a question that is not fully answered and is open to some proof as to whether or not LITTON SYSTEMS,

NC. now owns MC KIERNAN-TERRY CORP. Counsel for the respondent, LITTON YSTEMS, INC., at the oral argument on the motion in question was not prepared o admit that LITTON SYSTEMS, INC. was the successor in interest to MC KIERNAN-'ERRY CORP. as evidenced by the remarks set forth in the Reporter's Transcript n page 33, lines 16-25 and page 34, lines 1-14. In the present posture of this case, f this Court refuses to hear this appeal, and decide the question involved, appel-ant may well be forced to try her case, prove that MC KIERNAN-TERRY CORP. nanufactured the component parts and since it is a defunct corporation, she is com-letely prevented from maintaining her action against any successor in interest and nore particularly against LITTON SYSTEMS, INC. because they have never been n this case and appellant cannot now institute a separate action against LITTON YSTEMS, INC. under the Death on the High Seas Act.

For the foregoing reasons, it is urged that under the collateral order doc-rine set forth in 6 Moore's Federal Practice, paragraph 54.31 at page 235, this rder and its determination on appeal should not be deferred until a final determina-.on among the remaining defendants since it can't be reviewed at that time and ppellant would be trying a case from an impractical standpoint. This is especially o if the ultimate proof is that the only manufacturer of the parts involved was IC KIERNAN-TERRY CORP., a non-entity.

B. Jurisdiction for review under 28 U.S.C.A. 1292(3).

For the same reasons set forth above, it is submitted that jurisdiction lies in this Court under Title 28 U.S.C.A. Section 1292(3) which states as follows:

> "The Courts of Appeals shall have jurisdiction of appeals from . . . (3) Interlocutory decrees of such District Courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed; . . ."

The denial of a motion to amend a libel after the Statute of Limitations has run effectively terminates the libel and is an appealable order under the above statute. See A. H. Bull Steamship Co., et al. vs. United States (1946) 235 F.2d 1, 2. The collateral order doctrine also applies to such orders so long as they determine the rights and liabilities of the parties. See In Re Wills Lines, Inc. (1955) 227 F.2d 509, where the Court at page 510 cites Cohen vs. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 and quotes the following:

> "In that case it was held that appeals would lie from certain orders which, which technically interlocutory, 'finally determine claims of right separable from and collateral to rights asserted in the action, too important to be denied review, and too independent of the cuase itself to require that appellate consideration be deferred until the whole case is adjudicated.'"

If appellant is going to be prevented on future discovery from bringing in unknown parties, who may have had a hand in the manufacture of the arresting gear assembly, she should know it now, rather than going to the expense of locating and tracking down the multitide of assemblers and sub-assemblers that obviously were involved in the manufacture of the component parts of this vessel. Assume for the sake of argument that a Swedish Corporation manufactured the sheave that exploded

n the arresting gear engine. As of now, since the Swedish Corporation is not amed in the libel, they could successfully come in and defeat the attempted service f a citation upon them as a fictitiously named defendant setting up the very reasons nat the Court acceded to so far as LITTON SYSTEMS, INC. is concerned. A final etermination in this case between the parties that are left before the Court would ave no effect on any possible parties who are not defendants and there would be no nerger of the orders denying the amendment into the final judgment. Appellant is ot willing nor should she have to wait and run the risk of being wrong.

. Question involved on the appeal.

I. Use of fictitiously named defendants.

There is no Admiralty Rule nor Rule of Civil Procedure that specifically ermits the use of fictitiously named defendants in a case where jurisdiction is not redicated upon diversity of citizenship, nor are there any rules that prohibit such practice.

The only case in the United States on the admiralty side, which allows the se of fictitiously named defendants, is Phillips vs. The United States (1955) 127 . Supp. 912, where the United States District Court for the Northern District of alifornia, Southern District speaking through Oliver J. Carter, Judge, says at age 914:

> "Respondent moves to dismiss the first amended libel on the grounds that the use of 'Doe parties' in admiralty suits is improper and objectionable . . . But there is ample authority for the proposition that admiralty practice is particularly liberal, especially as to the allowance of amendments. (citations). . . . . .
>
> The general rule is described in 2 Benedict on Admiralty 557,

as follows:

'It has always been the practice in the American admiralty courts to allow every facility to the parties to place fully before the court their whole case and to enable the court to administer substantial justice between the parties . . . Therefore, on proper cause shown, omissions and deficiencies in pleadings may be supplied and errors and mistakes in practice, in matters of substance as well as of form, may be corrected at any stage of the proceedings for the furtherance of justice.'

Furthermore there is a large element of judicial discretion in the matter of allowing amendments, as shown by the following statement from the opinion in Jacobs vs. Pennsylvania R. Co., D.C. Del., 31 F. Supp. 595, 596:

'Whether amendments are to be allowed or refused is almost wholly within the discretion of the Court. Modern authorities favor allowing amendments to prevent failure of justice, especially where the statute of limitations has run.'

And in 2 Benedict on Admiralty 559-560, with reference to the exercise of judicial discretion in the allowance of amendments:

'The whole subject rests entirely in the discretion of the court, as well in relation to the relief to be granted, as to the terms on which it shall be granted, but the court is inclined to invite amendments if at any time a proctor discovers that

his pleadings are incorrectly drawn.'

In view of the extreme liberality of procedure in admiralty, no objection is seen to the designation of unknown parties by fictitious names. The practice of pleading Doe parties is in common use in many states and has a beneficial use in cases involving a situation similar to the case at bar. If the practice of using Doe parties is not approved by this Court, libellant will be prevented from having his day in court.

It is immaterial that there is no precedent for the procedure followed herein: The power of the district courts to permit new practices in admiralty cases in order to deal adequately with new situations stems from Supreme Court Admiralty Rule 44:

'Rule 44. Right of trial courts to make rules of practice.

'In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.'

28 U.S.C.A. Admiralty Rules.

A leading case construing Rule 44 is The Cleona, D.C.S.D.N.Y., 37 F.2d 599, 600, in which District Judge Woolsey said:

'In the first place, it must be remembered that, fortunately,

admiralty practice is plastic. It is largely judge-made, and consequently not technical-in fact, it is less technical than equity practice. Broadening from precedent to precedent, and based on a wisely administered convenience, admiralty practice has always been prepared to cope with new situations as they have arisen. (Citations omitted.)

'. . . there has never been any tendency in the rules which the Supreme Court has promulgated to limit the freedom of the District Courts in adopting new rules or principles of admiralty practice on appropriate occasion, provided the practice adopted does not conflict with the Supreme Court rules.

'I feel, therefore, that I am quite free to use my discretion in dealing with this new point in admiralty practice, and that it is my duty to exercise the power which I hold in trust for the benefit of litigants and to adapt admiralty procedure in this case to the practical needs of justice.'"

From the memorandum of decision put forth by the District Court, it is apparent that the Court conceded to the use of fictitiously named defendant in the Federal Court and more particularly that in the instant case, such a procedure was proper. (See Cl. Tr., p. 29, ll. 11-23.) It is from this point that appellant disagrees with the District Court in denying the motion to amend and basing the denial on the relation back aspect of the amendments under Rule 15 (c) of the Federal Rules of Civil Procedure. At the oral argument of the motion, it was

ointed out and the Court conceded that the filing of an action against a named defend-
nt within the statutory period of time, service could be made on that defendant
fter the statutory period of time. (See Rep. Tr., p. 20, ll. 21-25, and p. 21, ll.
-11.) It was further pointed out and apparently understood by the Court that, if a
ctitiously named defendant was served after the running of the Statute of Limitations,
uch service would be proper and the defendant would be held to answer, specifically
1 the State Courts where such a practice is common place. (See Rep. Tr., p. 31,
. 2-25, and p. 32, ll. 1 and 2.) It is at once apparent that the Court did not under-
tand the proposition that once a defendant is named, whether named individually or
ctitiously, then so far as that defendant is concerned the cause of action has been
ommenced and has always been maintained against the known, as well as the un-
nown defendants. The motion presented by appellant was merely to change the
ame of Doe I to read LITTON SYSTEMS, INC. Doe I had been sued within the
tatutory period of time and the change in the name does not involve any relating
ack problems that come into question under Rule 15 (c). The authority for the
roposition put forth by appellant at the present time to the effect that you may serve
fictitiously named defendant after the running of the Statute of Limitations is the
'hillips' case cited above. In that case, it is abundantly clear that the law suit was
led just prior to the running of the statute of limitations and a fictitiously named
efendant was sued and after the statute had run, the libel was amended to change
ne name from Doe I to the true name of the defendant. In this case, the situation is
o different than if LITTON SYSTEMS, INC., had been a named party and had been
erved at the same time and the same place as they were served with the service

being on them by their true names as against a fictitious name.

It is respectively submitted that the procedure used to serve LITTON SYSTEMS, INC., as Doe I and move to amend the libel to show their true name is not within Rule 15 (c), since we are not trying to bring in a new defendant, after the running of the Statute of Limitations, but are merely identifying the party who had previously been sued as DOE I. Rule 15 (c) applies to a situation where there is actually a change in the party that is to be brought into the litigation and it is where there is an attempt to bring in a party who was not contemplated by the plaintiff at the time of the filing of the action, but who was found out later to be a party that could have been contemplated. The libel in this case clearly alleged a cause of action against 10 fictitiously named defendants and appellant clearly indicated an intention to sue these ten people, but at the filing stage she was not aware of their true names and capacities but she was aware that they were in existence. The District Court by its ruling here has said that the Statute of Limitations is in reality a statute of discovery. If a fictiously named defendant must be served prior to the running of the Statute of Limitations then there is no reason to allow the use of fictitious names. If a litigant knows the name of a defendant within the statutory period it would not serve any purpose to sue him by a fictitious name and then serve him before the running of the statute.

However, when you do not know his true identity but do wish to commence the action on time, a fictitious name is used. This is exactly what appellant did here.

Adhering to the reasoning of this District Court, a named party can say

ou must serve me before the Statute of Limitations has run or else I will claim had no notice within the statutory period of the action. A Statute of Limitations is limitation on the exercise of a right not a limitation of notice to the proposed efendant.

II. Rule 15 (c) and its applicability.

Rule 15 (c) was amended in 1966, and, so far as pertinent to this discussion eads as follows:

> "(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> . . . "

he underscoring sets for the new matter that was added by the amendment.

It is submitted that Rule 15 (c) does not apply to a case where the true

name and identity of a fictitious party is involved. Such a situation is not changing a party, it is merely changing the description of a party. See 3 Moore's Federal Practice, paragraph 15.08 (5), page 923, f.n. 15. When it is clear that the person before the court is the person the plaintiff intended to sue amendment should be allowed. See 3 Moore's Federal Practice, paragraph 15.15 (4-1), page 1040.

If Rule 15 (c) is controlling on the amendment sought then a careful reading of subdivision (1) should be undertaken. It specifically says that the defendant should receive notice of the action and not be prejudiced in his defense on the merits. The Advisory Committee's Note contained in 3 Moore's Federal Practice, 1967 Supplement at page 75 says:

" . . . received such notice of the institution of the action - the notice need not be formal - that he would be prejudiced . . . "

and by such language indicates that some knowledge should be had by the defendant sought to be charged. In this case the affidavit of Harry R. Folk (Cl. Tr., pp. 70 and 71) clearly demonstrates that this defendant, LITTON SYSTEMS, INC., was aware of the accident and was investigating the same before it was officially apprised of the present case. It can hardly be said that the crash of an airplane resulting in the loss of life by the pilot and two legs by a seaman would be investigated two times; once when the seaman sued, and again when the pilot sued. Under the circumstances here LITTON SYSTEMS, INC. would not be prejudiced in its defense on the merits no matter when it was served with the instant libel. Its defense is the same to any and all claims arising out of this accident.

Further reflection on the import of the new amendment illustrates that

changes the Statute of Limitations applying to the Death on the High Seas Act from e of commencement to one of discovery. The pertinent section is 46 U.S.C.A. ction 763 and states:

> "Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered."

is is a Federal Law enacted by Congress and clearly requires only the filing of action within two years of the date of death, it does not require the discovery the true home of all persons to be charged within the two years. Appellant has mplied with the controlling Statute of Limitations and sued then defendants whose mes and identities are not known and Rule 15 (c) cannot set up a new limitation. ie amendment of a federally created right can only be done by the Congress of the ited States.

It is a legal fiction to claim that the filing of any action gives notice to a fendant that he is being sued. If such were the case then there would not be any quirement of personal service. In order to give the court jurisdiction over a rty there must be more than mere filing to apprise him of the suit. The filing is erely a requirement that there be a commencement within a certain period of

time. To require notice of the commencement of the action prior to the running of the Statute of Limitations changes the terms of the statute. Such a rule is permissib where the party has not been sued before and the plaintiff did not seek redress against him. This really does not change the purport of the Statute of Limitations. But here where a plaintiff sues a defendant who is not presently known to him by name, and does so within the statutory period, it is judicial legislation to tell him that before he can show his true name he must serve him prior to the running of the statutory period.

When fictitiously named defendants are permitted, the Statute of Limitations is complied with if suit is commenced within the proper time. This libel should be allowed to be amended to show the true identity of Doe I as LITTON SYSTEMS, INC. and they should be required to answer.

Respectfully submitted,

/s/ WALTER P. CHRISTENSEN

Attorney for Appellant.

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ WALTER P. CHRISTENSEN